

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MAURICE VAN HALL, DAVID I. MIDDLETON, HENRI SCHWEGMAN,
JAMES L. McMILLAN, and IAN BARRETT

Appeal No. 1999-0178
Application No. 08/658,849

ON BRIEF ¹

Before COHEN, NASE, and BAHR, Administrative Patent Judges.
COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 10. These claims constitute all of the claims in the application.

¹ The hearing set for March 6, 2000 was waived by appellants (Paper No. 21).

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Appellants' invention pertains to a breathing apparatus. A basic understanding of the invention can be derived from a reading of exemplary claim 1, a copy of which follows.

1. A breathing apparatus comprising:

(i) at least one substantially spherical² container for holding breathable gas under pressure, and

(ii) a harness³ to which the at least one container is attached for securing the at least one container to the user.

As evidence of obviousness, the examiner has applied the documents listed below:

Meikle	932,880	Aug. 31, 1909
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² The word "substantially" is a word of degree. In the context used, it is not readily apparent to us that appellants' underlying disclosure gives an understanding as to what a "substantially spherical" container would be. As such, for purposes of this appeal, the term "substantially spherical container" can only be understood to be a container which has some apparent spherical characteristics. This matter will be further addressed, infra, in a remand to the examiner.

³ In light of the underlying disclosure, we comprehend a harness for securing the at least one container to a user to denote a securement structure intended to be supported by a person.

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Vestrem	2,238,759	Apr. 15, 1941
Meidenbauer, Jr.	2,406,888	Sep. 3, 1946
Reiher	4,195,949	Apr. 1, 1980
Kranz	4,250,876	Feb. 17, 1981

The following rejections are before us for review.

Claims 1, 6, and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Meikle in view of Reiher.

Claims 2 through 4, 8, and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Meikle in view of Reiher, as applied to claim 1 above, further in view of Meidenbauer, Jr.

Claim 5 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Meikle in view of Reiher, as applied to claim 1 above, further in view of Vestrem.

Claim 10 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Meikle in view of Reiher, as applied to claim 1 above, further in view of Kranz.

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The full text of the examiner's rejections and response to the argument presented by appellants appears in the office action

of December 19, 1996 (Paper No. 4) and the answer (Paper No. 13), while the complete statement of appellants' argument can be found in the main and reply briefs (Paper Nos. 12 and 16).

OPINION

In reaching our conclusion on the obviousness issues raised in this appeal, this panel of the board has carefully considered appellants' specification and claims, the applied teachings,⁴ and the respective viewpoints of appellants and the examiner. As a consequence of our review, we make the determinations which follow.

⁴ In our evaluation of the applied prior art, we have considered all of the disclosure of each document for what it would have fairly taught one of ordinary skill in the art. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). Additionally, this panel of the board has taken into account not only the specific teachings, but also the inferences which one skilled in the art would reasonably have been expected to draw from the disclosure. See In re Preda, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

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We do not sustain the examiner's respective rejections of appellants' claims under 35 U.S.C. § 103(a). Our reasoning in support of this conclusion appears below.

As to the content of claim 1, the sole independent claim in the application, the examiner relies upon the combined teachings of Meikle and Reiher. In the Meikle patent, the examiner focuses upon the oxygen tank (container) 21 and proposes a modification as to the shape thereof to effect the claimed "substantially spherical container". As support for the aforementioned change, the examiner looks first to the asserted spherical oxygen containers (bottles) 57 of Reiher (page 2 of Paper No. 4) and later (answer, page 6) to a container of Reiher (capsule 18 comprising a shell 21) preferably spherical in shape (column 4, line 19).

The Reiher patent does not expressly describe a shape for the oxygen containers or bottles 57. Further, based upon the support assembly for the bottles (Figures 6 and 9; column 6, lines 28 through 37), we do not perceive that one having ordinary skill in the art would have comprehended that the

containers or bottles 57 have a substantially spherical shape. Accordingly, the bottles 57 would not have suggested a substantially spherical shape for the container 21 of Meikle. With respect to the emergency capsule shell 21, it clearly is described as being spherical in shape. However, this shell is intended to be a life supporting environment for saturation divers if life support systems of the main decompression chamber 14 fail. As such, it is clear to us that one having ordinary skill in the art would not have derived a suggestion from the shape of Reiher's shell 21 to configure Meikle's container 21, intended to be carried by a person, with a substantially spherical shape, as now claimed.

Since the evidence of obviousness does not provide support for the proposed modification of the Meikle teaching, the rejection of claim 1 cannot be sustained. A review of the other applied patents to Meidenbauer, Jr., Vestrem, and Kranz, cited to show other claimed features, reveals to us that they do not overcome the noted deficiency of the combined teachings of Meikle and Reiher. Based upon the above deficiency in the

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evidence of obviousness, as applied, each of the examiner's obviousness rejections cannot be sustained.

REMAND TO THE EXAMINER

We remand this application to the examiner to consider the following matters.

1. The examiner should consider whether the language "substantially spherical" container (claims 1, 6, and 10), "similar" containers (claim 7), and a "third similar" container (claim 8) address definite or indefinite terms of degree, when read in light of the underlying disclosure. See Seattle Box Co. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 826, 221 USPQ 568, 574 (Fed. Cir. 1984).

2. The examiner should also assess whether claim 1, in particular, is taught or suggested by the expansion chamber 28 and harness of Meikle (Figure 1) since it appears that the expansion chamber may fairly be said to have a substantially

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spherical shape and would contain an ample charge of oxygen under pressure (page 2, lines 71 through 88). If the examiner concludes that the subject matter is taught or suggested by Meikle, an appropriate rejection under 35 U.S.C. § 102(b) or 35 U.S.C. § 103 should be considered. Similarly, the other pending claims should be reviewed. For example, as to claims 2 and 5, the examiner should consider that Meikle discloses two containers, i.e., expansion chamber 28 and oxygen tank 21. The examiner should also evaluate the combined teachings of Meikle and other prior art, e.g., the teaching of bottle "b" in Figures 2 and 3 of Keller et al (U.S. Patent No. 2,406,334 of record in the application).

In summary, this panel of the board has not sustained each of the examiner's rejections under 35 U.S.C. § 103(a). Additionally, we have remanded the application to the examiner to review the matters specified above.

The decision of the examiner is reversed.

REVERSED AND REMANDED

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Administrative Patent Judge)	
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